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In the Supreme Court of the United States

OCTOBER TERM, 1958

WABASH RAILROAD COMPANY, ET AL., APPELLANTS,

v.

COMMERCIAL TRANSPORT, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court setting aside an order of the Interstate Commerce Commission which denied the application of Commercial Transport, Inc. (Commercial) for a certificate authorizing it to transport cement as a common carrier by motor over irregular routes between points in Illinois and Missouri.

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On October 26, 1956, Commercial filed an application with the Commission seeking a certificate of public convenience and necessity authorizing such operations. A joint board, following the taking of testimony, issued a report recommending that the application be granted, but on exceptions to this report Division 1 of the Commission ruled that the application be denied. The full Commission denied a petition for reconsideration, and Commercial then instituted the present action to set aside the order denying its application and the order denying reconsideration. A three-judge district court unanimously held that the Commission had erroneously failed to assess the inherent advantages of the proposed motor service, and accordingly it set aside the Commission's orders and remanded the cause to the Commission for further proceedings.

The facts as set forth in the Commission's report and the district court's findings of fact are not in dispute.

At present Commercial transports bulk liquids, chiefly petroleum products, over irregular routes between points in Illinois and Missouri, under certificates authorizing such common carrier operations (fdg. 1,[1] J. St. 24). It has about 51 tractors and 36 tank trailers, and, due to seasonal use of fuel oil, it has extra tractors available during the spring, summer, and early fall when the demand for bulk cement

[1] The designations "fdg.", "Rep.", and "Tr." will be used when referring respectively to the district court's findings of fact, the Commission's report, and the transcript of the hearing before the joint board.

is greatest (Rep., J. St. 33). If the requested authority is granted, its excess equipment will be used for transporting cement, and it will acquire additional equipment especially suited for this transportation (*ibid.*). The large highway building program scheduled by the state of Illinois requires use of large quantities of bulk cement, which now is transported for this purpose only by rail (fdg. 2, J. St. 25).

Both the Commission and the court found that the proposed truck service has several marked advantages over rail service. (1) Orders for rail shipments must be placed a day in advance and, if unloading is prevented by rain on day of arrival, demurrage amounting to as much as $1,000 must be paid (Tr. 66, 69–70), whereas truck service would permit ordering on day of delivery and cancellation of delivery in the event of rain. (2) Use of rail service requires the consignee to build at every job site a special switch or spur line costing from $1,500 to $4,000, but motor service, which is "door-to-door", would eliminate this expense except where sand and gravel shipments are by rail instead of by truck. (3) Motor carriage would largely eliminate losses incurred when, as is usually the case with volume rail shipments, large quantities of cement are left over at the completion of a job. (fdg. 3, J. St. 25–26; Rep., J. St. 33–34.)

Commercial's application was supported by the Association of General Contractors of Illinois, an organization representing approximately 116 highway and general construction firms, and by the Hefkin Company, Inc. (Hefkin), a general contractor engaged in building highways in Illinois and Missouri (fdg. 3,

J. St. 25; Rep., J. St. 33, 34). Hefkin stated that Commercial's proposed truck service would be of great aid (Tr. 62) and would be used to supplement rail service (fdg. 4, J. St. 26). Four railroads, the present appellants, anticipating loss of considerable traffic if the certificate for motor truck service were to issue, opposed the application (fdg. 6, J. St. 26; Tr. 94, 123). It was also opposed by three of the five cement producers now supplying Hefkin (fdgs. 4–5, J. St. 26).

The Commission denied Commercial's application upon the sole ground, or the sole valid ground,[2] that "the cement producers, who control the routing of the traffic, would not utilize" the proposed motor service (Rep., J. St. 35). From this, it drew the conclusion that Commercial had not sustained its burden of proof with respect to the public convenience and necessity of the service covered by its application (*ibid.*).

The court below held that the Commission had erred in treating the testimony that certain producers of cement would not use Commercial's service, if available, as decisive on the issue of public convenience and necessity, and in thus failing to assess the established "inherent advantages" of motor service to an important segment of the shipping public, road construction contractors, who presently have only rail service available (J. St. 22–23). The Commission,

[2] While the Commission stated that the contractor supporting the application had made no investigation of "existing motor carrier service" (J. St. 34–35), the record and the Commission's findings show that there is no such existing service. In these circumstances, the failure to investigate was, as the court below held (J. St. 22), "of no significance."

the court said, had failed to "assess the advantages of the proposed service in relation to public need" (J. St. 23).

In the district court the United States supported Commercial. Counsel for the Commission supported its order, but after the court set aside the order the Commission did not appeal. Instead, in accordance with the court's order of remand, it reopened the proceeding for further hearing (J. St. 36).[3]

ARGUMENT

In *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, the Commission had denied a motor carrier's application to provide service between points currently served exclusively by rail, and had based this decision upon the ground that existing rail service was reasonably adequate. This Court noted that the National Transportation Policy formulated by Congress requires the Commission to administer all provisions of the Act so as to "recognize and preserve the inherent advantages" of each mode of transportation, and held that "[w]hen a motor carrier seeks to offer service where only rail transportation is presently authorized, the inherent advantages of the proposed service are a critical factor which the Commission must assess." 355 U.S. at 89–90. It set aside the Commission's order because the Commission had not, or had not shown that it had, made such assessment. The Court likewise recognized that the objectives to be achieved, under the National Trans-

[3] After the intervening railroads had filed a notice of appeal, the Commission suspended all further proceedings pending the outcome of the appeal (J. St. 36–37).

portation Policy declaration, are not self-executing, that they "overlap and may conflict, and, where this occurs, resolution is the task of the agency that is expert in the field", i.e., the Commission. *Id.* at 92.

The present case is in all respects parallel to *Schaffer* except that the ground for denial of the motor carrier application was the stated unwillingness of cement producers, "who control the routing of the traffic", to utilize the proposed truck service. In this case also the statutory duty of the Commission to administer the Act in such manner as will give recognition to the inherent advantages of each mode of transportation does not appear to have been fully exercised, insofar as the Commission failed to give recognition to the advantages inherent in motor service—by denying authorization of this service notwithstanding its superiority over the only mode of transportation currently available (rail)—solely because of doubt as to whether the proposed motor service would be utilized following authorization thereof.

The utilization or non-utilization of a proposed motor carrier service is a relevant consideration in determining whether a proposed service "is or will be required by the present or future public convenience and necessity" within the meaning of § 207(a) of the Act, 49 U.S.C. 307(a). But in this case the Commission made doubt as to utilization of the service the controlling consideration, and did not evaluate this as merely one factor to be weighed, along with other pertinent factors, in determining public convenience and necessity. Rather the ruling was that Commer-

cial's application had to be denied because it had failed affirmatively to show that its service would be utilized.

The appellants start with the proposition that an applicant for motor carrier authority has the burden of proof as to public convenience and necessity. This we do not dispute. But public convenience and necessity is a complex of many factors. Clearly the most vital and critical factors are whether there is a strong public demand for the proposed service and whether it has distinct advantages over a different mode of transportation which alone is presently available. Here, Commercial established these factors, and thereby sustained the burden of showing public need for its service.[4] To overcome this showing, those opposing the application were entitled to show, as an offsetting consideration, that grant of the requested authority would be a futile thing because it would not eventuate in the actual rendition of a new service. The balancing of this and other factors was then for the Commission, but instead of undertaking such balancing, it denied the application upon the basis that Commercial had not met the burden of proof resting upon it.

In addition, other facts—not taken into account in the administrative decision—created a strong presumption that the proposed service, if authorized, would be utilized. The fact that Commercial incurred the expense of filing and prosecuting its application

[4] Decisions cited by appellants (J. St. 8–9) involving "grandfather rights" given by Section 206(a)(1) of the Act, where the statutory basis for grant of authority is actual operation on the critical date and subsequent thereto, are irrelevant to the question of burden of proof as it arises in the instant case.

evidenced its belief that the proposed service, if authorized by the Commission, would be utilized. The appellant railroads, in opposing the application upon the basis of anticipated loss of traffic should the application be granted, likewise evidenced their belief of at least dangerous probability of actual service eventuating from grant of the application. This is further evidenced by their appeal to this Court, for the purpose of securing reinstatement of the order denying the application. In *Northern Pacific Ry. Co. v. United States,* 356 U.S. 1, 11–12, this Court, dealing with an analogous situation, said:

> Of course if these restrictive provisions are merely harmless sieves with no tendency to restrain competition, as the defendant's argument seems to imply, it is hard to understand why it has expended so much effort in obtaining them in vast numbers and upholding their validity, or how they are of any benefit to anyone, even the defendant.

Appellants contend (J. St. 10) that the court below held that the Commission should have inferred that Commercial's services would be used by the two area cement producers who did not appear at the hearing, and that this holding was erroneous. However, the court below plainly made no such holding. It pointed out that the Commission did not find that Commercial's proposed service would never be used, but found merely that "the cement producers" would not utilize its service (J. St. 22). The court said that the latter finding was not the equivalent of a finding of nonutilization because only three of the five area cement

producers gave testimony respecting use of Commercial's service to transport bulk cement to the purchaser's job site (*ibid.*).

Even as to these three producers, the necessarily speculative conclusion as to what would be done in a situation not previously existing—an available trucking service and a large-volume purchaser demanding transportation thereby—is emphasized by the admission by the traffic manager of one of the producers that "because of competitive reasons," his firm "would naturally be forced into trucking * * * [if] cement is trucked from a cement plant in an area served by our plant" (Tr. 91; J. St. 22). Cf. *FTC* v. *Cement Institute*, 333 U.S. 683, 710, and the Federal Trade Commission's findings in that proceeding as to concerted efforts by cement producers to discourage or eliminate truck shipments (FTC brief in Nos. 23–34, October Term, 1947, pp. 74–76).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal presents no substantial question and that the judgment of the district court should be affirmed.

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